

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **200833013**
Release Date: 8/15/2008

Index Number: 9100.00-00, 2652.01-02

Third Party Communication: None
Date of Communication: Not Applicable
Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:PSI:04
PLR-127571-07
Date:
March 24, 2008

RE:

Legend

Decedent =
Husband =
Trust =
Marital Trust =
Trustee =
Date 1 =
Date 2 =
Date 3 =
Accountant =
\$A =
\$B =
\$C =
\$D =
State =

Dear :

This is in response to your authorized representative's letter, dated May 7, 2007, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to sever Marital Trust into two separate trusts for purposes of the generation-skipping transfer (GST) tax and to make a reverse qualified terminable interest property (QTIP) election under § 2652(a)(3) of the Internal Revenue Code with respect to one trust (the GST exempt trust). A ruling is also requested that the Decedent's remaining GST allocation will be treated as if automatically made under the automatic allocation provisions of § 2632(e).

On Date 1, Decedent established a revocable trust (Trust) pursuant to State law. Decedent died on Date 2, survived by Husband. Husband died on Date 3.

Article I, Section 4.B. of Trust provides that upon Decedent's death, a trust (Marital Trust) was to be created for the benefit of Husband in the amount necessary to reduce Decedent's federal estate tax, after taking into account all allowable deductions and available credits, to zero. The trustee of the Marital Trust was directed to distribute in convenient installments, but not less frequently than annually, all of the net income to or for the benefit of Husband for his lifetime. The trustee was also given authority to distribute to or for the benefit of Husband so much of the principal of Marital Trust as the Trustee determined to be necessary for his proper health, education, maintenance and support.

Article I, Section 4.C. of Trust provides that after funding the Marital Trust, the balance of Decedent's trust property was to be allocated to a Credit Shelter Trust.

Article I, Section 4.B (iii) of Trust provides that upon the death of Husband, the remainder of the Marital Trust was to be added to the Credit Shelter Trust. Article I, Section 4.C. provides that the remainder of the Credit Shelter Trust, augmented by the remainder of the Marital Trust, was to continue in trust as a testamentary charitable lead unitrust (CLUT) with the remainder payable at the end of the lead term to non-charitable beneficiaries or their descendants. Although none of the non-charitable remainder beneficiaries named in Trust represents a skip person for purposes of the GST tax, Trust provides that if any of the named remainder beneficiaries should die before the termination of the CLUT, his or her interest will pass in trust to his or her lineal descendants, per stirpes.

Article V, Section 10. provides, in part, that if a trust would be partially exempt from GST tax by reason of an allocation of GST exemption to it, before the allocation the trustee, in its discretion, may divide the trust into two separate trusts of equal or unequal value to permit allocation of the exemption solely to one trust which will be entirely exempt from GST tax.

Husband, as Executor of Decedent's estate, retained the services of Accountant to prepare and file Decedent's Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. On Schedule M of the Form 706, an election was made under § 2056(b)(7) to treat Marital Trust as QTIP, and an estate tax marital deduction in the amount of \$A was claimed. The Marital Trust was not divided into two separate trusts, and the "reverse" QTIP election was not made with respect to one of the separate trusts. On Schedule R, Generation-Skipping Transfer Tax, \$B was allocated to Credit Shelter Trust. However, \$C, the balance of Decedent's available GST exemption was not allocated on Schedule R.

Accountant was also retained to prepare and file Husband's Form 706. It was during the preparation of Husband's Form 706 that Accountant discovered his earlier failure to sever Marital Trust into two trusts, a GST exempt Marital Trust and a GST non-exempt Marital Trust, to make a reverse QTIP election with respect to the GST exempt Marital Trust, and to allocate Decedent's remaining available GST exemption to the GST exempt Marital Trust.

Trustee of Marital Trust requests an extension of time under § 301.9100-03 to (1) sever the Marital Trust into two separate trusts under § 2654; and (2) make the "reverse" QTIP election under § 2652(a)(3) with respect to one of the separate trusts. Trustee also requests a ruling that \$C, Decedent's remaining available GST exemption, will be treated as if automatically allocated to the GST exempt Marital Trust under the automatic allocation rules of § 2632(e).

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2056(a) provides that, for purposes of the tax imposed by § 2001, the value of the taxable estate shall, except as limited by § 2056(b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property that passes or has passed from the decedent to the surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

Under § 2056(b)(7)(A), an estate tax marital deduction is allowed for "qualified terminable interest property." Qualified terminable interest property is defined under § 2056(b)(7)(B)(i) as property: (1) which passes from the decedent to the surviving spouse; (2) in which the surviving spouse has a qualifying income interest for life; and (3) to which an election under § 2056(b)(7)(B)(v) applies.

Section 2056(b)(7)(B)(ii) provides that the surviving spouse has a qualifying income interest for life if: (I) the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property; and (II) no person has a power to appoint any part of the property to any person other than the surviving spouse.

Section 2056(b)(7)(B)(v) provides that an election under § 2056(b)(7) with respect to any property shall be made by the executor on the return of tax imposed by § 2001. Such an election, once made, shall be irrevocable.

Under § 2044, property subject to a QTIP election for which a deduction is allowed under § 2056(b)(7) is includible in the surviving spouse's gross estate on the surviving spouse's subsequent death.

Section 2601 imposes a tax on every GST made by a transferor to a skip person. A GST is defined under § 2611(a) as: (1) a taxable distribution; (2) a taxable termination; and (3) a direct skip.

Section 2602 provides that the amount of the GST tax is determined by multiplying the taxable amount by the applicable rate. Section 2641(a) provides that the term "applicable rate" means with respect to any GST, the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer. Under § 2642(a)(1), the inclusion ratio with respect to any property transferred in a generation-skipping transfer is generally defined as the excess of 1 over the "applicable fraction". The applicable fraction, as defined in § 2642(a)(2), is a fraction, the numerator of which is the amount of GST exemption under § 2631 allocated to the trust (or to property transferred in a direct skip), and the denominator is the value of the property transferred reduced by the sum of any federal estate tax or state death tax actually recovered from the trust attributable to such property and any charitable deduction allowable under § 2055 or § 2522 with respect to such property.

Section 2631(a), as in effect during the year of Decedent's death, provides that for purposes of determining the inclusion ratio, every individual is allowed a GST exemption that may be allocated by the individual (or his executor) to any property with respect to which the individual is the transferor. The GST exemption amount for the year of Decedent's death was \$D. Section 2631(b) provides that any allocation under § 2631(a), once made, is irrevocable.

Section 2632(a)(1) provides that an individual's GST exemption may be allocated at any time on or before the date prescribed for filing the estate tax return for such individual's estate (determined with regard to extensions), regardless of whether such return is required to be filed.

Under § 26.2632-1(d)(1) of the Generation-Skipping Transfer Tax Regulations, an allocation of a decedent's available GST exemption by the executor of the decedent's estate is made on Form 706 filed on or before the date prescribed for filing the return by § 6075(a) (including any extensions granted). An allocation of GST exemption with respect to property included in the gross estate of a decedent is effective as of the date of death.

As in effect during the year of Decedent's death, § 2032(c)(1) (redesignated as § 2632(e)(1) by P. L. 107-16, § 561(a)) provides that, in general, any portion of an individual's GST exemption that has not been allocated within the time prescribed by § 2632(a) shall be deemed to be allocated as follows: (A) first, to property that is the subject of a direct skip occurring at such individual's death; and (B) second, to trusts with respect to which such individual is the transferor and from which a taxable distribution or a taxable termination might occur at or after such individual's death.

Section 26.2632-1(d)(2) provides that a decedent's unused GST exemption is automatically allocated on the due date for filing Form 706 to the extent not otherwise allocated by the decedent's executor on or before that date. Unused exemption is allocated pro rata (subject to the rules of § 26.2642-2(b)0, on the basis of the value of the property as finally determined for purposes of the estate tax (chapter 11 value), first to direct skips treated as occurring at the transferor's death. The balance, if any, of unused GST exemption is allocated pro rata (subject to the rules of § 26.2642-2(b)) on the basis of the chapter 11 value of the nonexempt portion of the trust property to trusts with respect to which a taxable termination may occur or from which a taxable distribution may be made. However, no automatic allocation of GST exemption is made to a trust that will have a new transferor with respect to the entire trust prior to the occurrence of any GST with respect to the new trust.

Under § 2652(a)(1) and § 26.2652-1(a)(1), the "transferor" of the property for GST tax purposes is the individual with respect to whom the property was last subject to federal estate or gift tax. However, under section 2652(a)(3), in the case of a trust for which a deduction was allowed under § 2056(b)(7), the decedent's estate may elect to treat all of the property in the trust as if the § 2056(b)(7) election had not been made for purposes of the GST tax (i.e., a "reverse QTIP election"). Accordingly, the decedent, and not the surviving spouse, is treated as the transferor of the property for GST tax purposes. The reverse QTIP election is irrevocable and is not effective unless it is made with respect to all of the property in the trust to which the QTIP election applies. Under § 26.2652-2(b), the reverse QTIP election is made on the return of tax on which the QTIP election is made.

Section 2654 provides, in part, that, for purposes of the GST tax, the portions of a trust attributable to transfers from different transferors shall be treated as separate trusts.

Under § 26.2654-1(b)(1), the severance of a trust that is included in the transferor's gross estate (or created under the transferor's will) into two or more trusts is recognized for purposes of chapter 13 if the governing instrument does not require or otherwise direct severance but the trust is severed pursuant to discretionary authority granted either under the governing instrument or local law; and

- (A) The terms of the new trusts provide in the aggregate for the same succession of interests and beneficiaries as are provided in the original trust;
- (B) The severance occurs (or a reformation proceeding, if required, is commenced) prior to the date prescribed for filing the Federal estate tax return (including extensions actually granted) for the estate of the transferor; and
- (C) The new trusts are severed on a fractional basis. If severed on a fractional basis the separate trusts need not be funded with a pro rata portion of each asset

held by the undivided trust. The trust may be funded on a non pro rata basis provided funding is based on either the fair market value of the assets on the date of funding or in a manner that fairly reflects the net appreciation or depreciation in the value of the assets measured from the valuation date to the date of funding.

Section 26.2654-1(b)(3) provides that an individual's GST exemption under § 2632 may be allocated to the separate trusts at the discretion of the executor or trustee.

Under § 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation (and not expressly provided by statute).

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer has acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1)(v) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

In this case, because a QTIP election was made on Decedent's Form 706, the assets of Marital Trust are includible in Husband's gross estate pursuant to § 2044. Husband is considered the transferor of such property for GST tax purposes, thereby precluding the allocation of any of Decedent's GST exemption to Marital Trust. However, if Decedent's estate is granted an extension of time to sever Marital Trust into a GST exempt Marital Trust and a GST nonexempt Marital Trust and to make a reverse QTIP election with respect to the GST exempt Marital Trust, Decedent will be treated as the transferor of the GST exempt Marital Trust for GST tax purposes.

Based on the facts and representations made, we have determined that the standards of §§ 301.9100-1 and 301.9100-3 have been met. Article V, Section 10 of Trust provides the trustee with the discretion to divide Marital Trust into two separate trusts of equal or unequal value to permit allocation of Decedent's GST exemption to one of the trusts. Therefore, an extension of time is granted until 60 days from the date

of this letter to sever Marital Trust into a GST exempt Marital Trust and a GST nonexempt Marital Trust and to make a "reverse" QTIP election with respect to the GST exempt Marital Trust. As a result of the severance and the "reverse" QTIP election with respect to the GST exempt Marital Trust, Decedent's remaining GST exemption will be allocated to the GST exempt Marital Trust under § 2632(e)(1). Therefore, provided that the GST exempt Marital Trust and the GST nonexempt Marital Trust are funded as described in § 26.2654-1(b)(1)(C), the GST exempt Marital Trust will have an inclusion ratio of zero, and the GST nonexempt Marital Trust will have an inclusion ratio of 1.

The reverse QTIP election should be made on a supplemental Form 706. The supplemental Form 706 should be filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the return. A copy is enclosed for this purpose.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

William P. O'Shea
Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures (2)
Copy for § 6110 purposes
Copy of this letter

cc: